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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HAROLD A. HOUDEK, *et al.*, *Petitioners*,

v.

MOBIL OIL CORPORATION, *Respondent*.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

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RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Petition for Certiorari is jurisdictionally out of time because it was not filed within 90 days of the Colorado Supreme Court's denial of Certiorari, the final and last available remedy under Colorado's rules and procedures?

2. If not, whether the Colorado Court of Appeals correctly held that Petitioners' claims against their former employer are pre-empted by ERISA because, on its face, Petitioners' complaint seeks to recover (a) for their employer's alleged failure to make additional disclosures about its pension plan beyond those required by ERISA, (b) for their employer's alleged failure to comply with ERISA and (c) their lost pension benefits and other damages flowing from these alleged failures?

PARTIES TO THIS PROCEEDING

Petitioners are as listed in the Petition for Certiorari ["Pet."], at ii.

Respondent is Mobil Oil Corporation ["Mobil"]. Mobil states pursuant to S. Ct. R. 29.1, that it has interests in the following publicly traded subsidiaries:

Mobil Oil Ghana Limited
Mobil Oil Nigeria Public Limited Company

The Retirement Plan of Mobil Oil Corporation, itself and by the Trustees thereof [the "Plan"], was a defendant below. The claims against it were dismissed by the trial court, and that dismissal was affirmed by the Colorado Court of Appeals in the opinion of which Petitioners seek review. Petitioners have neither named the Plan in this Court, listed the Plan as required by S. Ct. R. 14.1(b), nor filed and served the statement required by S. Ct. R. 12.4. This omission is discussed below.

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v.

MOBIL OIL CORPORATION, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Mobil Oil Corporation ["Mobil"], a defendant below, respectfully requests that the Petition for Certiorari be dismissed as untimely, or, in the alternative, that it be denied.

We demonstrate below that the Petition is jurisdictionally untimely. We also show that Petitioners' prolix complaint alleges in essence that they were driven to retire because their employer, Mobil, amended Mobil's pension Plan [the "Plan"] in violation of the Employment Retirement Income Security Act ["ERISA"], 29 U.S.C. §§ 1001, et. seq., and without making disclosures that Petitioners claim state law should add to the disclosure requirements mandated by ERISA. Such claims "relate to" an ERISA Plan, ERISA § 514(a), 29 U.S.C. § 1144(a), and are therefore pre-empted. The Colorado Court of Appeals'

decision is consistent with that of every federal court of appeals that has considered whether there is pre-emption of a state law claim alleging that an employee retired based on a misrepresentation concerning pension rights and benefits. There is no occasion for review in this Court.

STATEMENT OF THE CASE

The case involves Mobil's pension plan, which is covered by ERISA. The Plan is administered by Mobil through trustees who are the Plan fiduciaries, and it covers some 50,000 current and former employees who reside throughout the United States and in several foreign countries. The Plan is a separate legal entity under ERISA.[1] It is an employer-contribution fixed-benefit plan; that is, it is actuarially designed by Mobil so that employees will receive on their retirement a sum of money that is guaranteed to them under the Plan's terms.

The normal form of benefit under the Plan has always been a lifetime annuity. Beginning in 1977, however, Mobil, like several other major corporations, provided an optional form of benefit to retiring employees. If the value of an employee's total accrued pension was at least $250,000, or if the employee had a net worth of at least $250,000, he or she could receive retirement benefits in a single lump sum. This "threshold" was also a device commonly used to ensure that employees had the financial strength to survive adverse

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[1] *Compare* ERISA § 3(3), 29 U.S.C. § 1002(3) (defining "plan" and "employee benefit plan" for purposes of ERISA) *with* ERISA § 3(5), 29 U.S.C. § 1002(5) (defining "employer").

investment experience.

Between 1977 and 1984, inflation eroded the value of $250,000. Mobil amended the Plan to raise the threshold to $450,000 and thereafter to index it to the cost of living. Other Plan changes also made the annuity option more attractive. Mobil announced these changes in July 1984, but permitted employees who had reached the $250,000 accrued benefit or net worth thresholds to take the lump sum, provided that (a) they were already retirement-eligible in terms of age and years of service, (b) they retired on or before January 1, 1985 [the "window period"], and (c) they certified that they had obtained independent professional advice about the consequences of taking a lump sum distribution.

Petitioners are former Mobil employees who met the accrued pension value or net worth standards (principally the former), and who retired on or before January 1, 1985 and received all their benefits in a single lump sum.

Petitioners and their counsel have conducted litigation centering on these basic transactions in several forums and under several theories. These cases have produced tens of thousands of pages of discovery from Mobil and the Plan, dozens of depositions, countless trial court appearances, one full merits trial, four United States Court of Appeals arguments, a state appellate court argument, and several certiorari petitions. The relevant highlights of Petitioners' "day[s] in court", compare Pet., at 8, are:

- In *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 498 U.S. 898 (1990), the Tenth Circuit held in a case involving just one plaintiff that

Mobil did not violate the Age Discrimination in Employment Act ["ADEA"], 29 U.S.C. §§ 621-634, and that the plaintiff lacked ERISA standing. The District Court had found Mitchell's state law claims were pre-empted by ERISA, and that ruling was not appealed.

- In *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir.), *cert. denied*, 113 S. Ct. 68 (1992) (Petitioners' Appendix ["Pet. App."] at 40a), the Fifth Circuit dealt with the claims of three "window period" retirees, holding their ADEA claims time-barred and their state law claims pre-empted by ERISA, and remanding with leave to replead their ERISA claims.

- In *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528 (10th Cir.), *cert. denied*, 114 S. Ct. 81 (1993), *leave to file petition for rehearing denied*, 114 S. Ct. 1391 (1994) (Pet. App. at 17a), the Tenth Circuit held in a class action suit in which Petitioners here were plaintiffs, that since plaintiffs voluntarily took all their benefits out of the Plan, did not quarrel that the computation of amounts was correct, and had no meaningful expectation of returning to covered employment, they had no standing to sue under ERISA. The Court therefore directed summary judgment for Mobil on the ERISA claims.

- In *Raymond v. Mobil Oil Corp.*, 7 F.3d 184 (10th Cir. 1993), *cert. denied sub nom. Morrison v. Mobil Oil Corp.*, 114 S. Ct. 1070 (1994), the Tenth Circuit

> held that plaintiffs' ADEA claims had not been timely filed. It therefore directed summary judgment for Mobil on these claims, holding that plaintiffs' counsel's efforts to keep the claims alive were no more than "artful pleading." 7 F.3d at 186.

This Colorado state court case rests on a 117-paragraph complaint, which shows on its face that the Colorado Court of Appeals was right to find Petitioners' claims pre-empted.[2] We have included the complaint as an Appendix, because there is a gap between the case Petitioners say exists and that framed by the allegations they filed.

Petitioners complaint alleges that Mobil failed to disclose that the Plan amendment changing the lump-sum eligibility requirement was invalid because (1) it violated ERISA § 204(g), 29 U.S.C. § 1104(g), as interpreted by the Internal Revenue Service and as amended by the 1984 Retirement Equity Act ["REA"][3] and (2) would "be viewed as an 'impermissible preference' under Title I of ERISA" [complaint ¶¶ 21-29, 32-33, 38, 47-49, 52, 67]. Petitioners also allege that Mobil failed to make timely disclosure of an additional amendment to the Plan allowing for discretionary waivers of the lump-sum eligibility requirements or to disclose discussions with the Internal Revenue Service concerning that amendment [*id.* ¶¶ 57, 60-65, 68, 75, 89-91].

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[2] This case comes up on dismissal of the complaint as pre-empted. Therefore, the well-pleaded facts provide the "factual" record.

[3] Pub. L. 98-397, title III, 301(a)(1), 98 Stat. 1450. The effective date of REA was after Mobil announced the amendment changing the lump-sum eligibility requirement [complaint, ¶ 67].

The complaint, thus, is premised on two core theories:

- first, that Mobil's pension plan was amended in violation of ERISA and a 1984 ERISA amendment, REA, which Petitioners claim should be interpreted to void "cutbacks" in this plan;

- second, that although Mobil complied with ERISA disclosure requirements in amending its Plan and announcing those amendments, Colorado common law should require additional and earlier disclosures.

The first theory cloaks an alleged ERISA violation as a state law tort action. The second theory invites a Colorado state court to impose pension plan disclosure obligations that are not required by the complex and detailed federal ERISA statutes and regulations. Both theories "relate to" an ERISA-governed plan and are therefore pre-empted.[4]

REASONS THE PETITION SHOULD BE DISMISSED OR DENIED

1. The Petition is untimely.

28 U.S.C. § 2101(c) requires that a petition for certiorari to review a civil case judgment be filed "within ninety days after the entry of such judgment or decree." Supreme Court Rule 13.1, governing review of the judgment

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[4] Even the definition of the putative class is in terms of Mobil employment, Plan participant status, and entitlement to Plan benefits [*id.* ¶9].

of a lower state court, applies this statute. The ninety day limit is "mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

The Colorado Court of Appeals entered its judgment January 13, 1994. Petitioners' rehearing petition in that court, filed pursuant to Colorado Appellate Rule ["CAR"] 40, was denied. Petitioners then sought discretionary review in the Colorado Supreme Court, which denied the writ of certiorari on August 29, 1994. *Houdek v. Mobil Oil Corp.*, 879 P.2d 417 (Colo. App. 1994), *cert. denied* (August 29, 1994) (Pet. App. at 1a). Ninety days from August 29, 1994 ran out on November 29, 1994. The present Petition was filed December 13, 1994.

Petitioners premise their claim of timeliness, and jurisdiction, on their "timely" filing of a petition for rehearing from the Colorado Supreme Court's denial of certiorari. Pet., at 2. However, contrary to Petitioners' assertion, the Colorado Appellate Rules do not permit the filing of petitions for rehearing from denial of certiorari. Neither CAR 54(b), on which Petitioners rely, nor any other statute or rule of Colorado appellate procedure, authorizes the Colorado Supreme Court to rehear its denial of a petition for discretionary review. CAR 54(b) authorizes rehearing *only* in cases where certiorari has been granted.[5] CAR 2 permits the court to suspend procedural prerequisites in a particular case where it has jurisdiction, but it does not allow the court

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[5] The only provision for rehearing in the Colorado Supreme Court reads: "If, *after granting the writ*, the court later denies the same as having been improvidently granted or renders decision by opinion of the court on the merits of the writ, petition for rehearing may be filed in accordance with the provisions of CAR 40." CAR 54(b) (emphasis added).

to expand its jurisdiction where, as here, none otherwise exists under Colorado statutes and rules.[6] The court could not, and did not, suspend its rules in this case.

Petitioners' statement that the Colorado Supreme Court "allowed" their unauthorized petition, and their quotation of boilerplate language in the order denying their pleading, is of no significance to their jurisdictional analysis. Filing an unauthorized pleading does not toll the time for petitioning for certiorari in this Court,[7] and the Colorado courts are powerless to invent a means for conferring jurisdiction when Congress and this Court's rules deny it.[8]

Because Colorado does not permit filing petitions for rehearing of certiorari denials, such a filing could never be "timely" under S. Ct. Rule 13.4. This Petition is not timely and must be dismissed.

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[6] *See, e.g., Colorado Ass'n of Public Emp. v. Department Of Highways*, 809 P.2d 988, 990 n.1 (Colo. 1991) (Colorado Supreme Court can suspend procedural rules under CAR 2 only where case is otherwise "within [its] jurisdiction").

[7] Petitioners' unauthorized rehearing petition is charged with invective and concludes with this concession: "If the Court of Appeals saw no injustice in denying petitioners their day in court, the injustice should not be compounded by leaving them merely with an intermediate appellate opinion whose lack of express holdings will most likely not interest the supervisory powers of the United States Supreme Court." Petition for Rehearing, at 5.

[8] *See Missouri v. Jenkins*, 495 U.S. at 49 ("the time for applying for certiorari will not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending that time").

2. Petitioners have pleaded a case that "relate[s] to," and challenges the administration of, the Mobil Plan in dozens of ways. The Colorado Court of Appeals correctly applied ERISA pre-emption law to these allegations, in a manner consistent with the law of every federal circuit.

a. Petitioners' complaint.

The complaint named Mobil and the Retirement Plan of Mobil Oil Corporation, "itself and by the Trustees thereof." The employer, the Plan and the Plan fiduciaries, as well as the Plan participants and beneficiaries, are the basic ERISA entities for which ERISA creates a detailed and interrelated set of duties.[9]

The complaint presents six claims, all variations on a single theme. The first and second are for "common law fraud." The third and fourth are for "negligent misrepresentation." The fifth claim alleges a "civil conspiracy." The sixth claim is for "interference with contractual rights." In ¶ 14, Petitioners allege that Mobil planned to rid itself of senior employees and save $75 million per year, and in ¶ 15, that Mobil chose "its retirement plan as the vehicle for ridding itself of such employees."

Petitioners go on to allege that in order to achieve these goals, Mobil and the Plan

- prevented them from obtaining a waiver of the

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[9] *See, e.g., National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir.), *cert. denied*, 113 S. Ct. 406 (1992).

threshold for receiving their pension benefits as a lump sum [complaint ¶¶ 57, 60, 61, 81, 89],

- cut back on their ERISA Plan rights in violation of the 1984 ERISA amendments contained in REA [*id.* ¶¶ 67, 81, 91],

- failed to make disclosures about Plan amendments and Plan status [*id.* ¶¶ 52, 60, 61, 64, 81, 89, 91, 97], and by these actions

- proximately caused Petitioners to retire from Mobil by January 1, 1985 in order to be assured of getting their pension benefits in the sizable lump sum they all admit receiving, and therefore wrongfully discharged them.

This characterization of Petitioners' case is true of all six claims pleaded in their complaint; all their claims "relate to" the Plan in every one of these ways.

Petitioners are wrong in saying that their wrongful discharge claims "would not implicate any conduct of the Plan" and that "there is no allegation in the complaint that Mobil had a pension-defeating or retaliatory motive for its conduct." Pet., at 6. Indeed, the complaint alleges that "[t]he Plan, acting through its trustees, fiduciaries and agents, aided, abetted and ratified Mobil's misconduct as alleged herein and conspired with Mobil and others to violate plaintiff's [sic] rights, as alleged herein" [complaint ¶ 73]. Furthermore, as the Court of Appeals recognized, Petitioners themselves allege that Mobil was acting in its capacity as

fiduciary and Plan administrator [*id.* ¶ 4].[10] The "rights" purportedly violated by Mobil and the Plan were rights to receive a lump-sum pension under the Plan.

Petitioners' argument against pre-emption stands or falls on the allegations of their complaint and not those suggested by their petition. *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990) rules this case and mandates pre-emption, for "[h]ere, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the *plan* itself."[11] Indeed, as *Christopher* held, "the basis of the claims themselves is the operation of the pension plan; if appellants' claims were stripped of their link to the pension plans, they would cease to exist."[12]

As a matter of Colorado procedural law, Petitioners are barred from recasting their case at this late hour.[13] They did not seek leave to amend their complaint in the trial court, either before or after the order of dismissal. They elected

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[10] *Houdek*, 879 P.2d at 423 (Pet. App. at 10-11a).

[11] 498 U.S. at 139-140 (emphasis added).

[12] 950 F.2d at 1220 (Pet. App. at 57a), quoted with approval in *Houdek*, 879 P.2d at 423 (Pet. App. at 9a).

[13] *See Fladung v. City of Boulder*, 165 Colo. 244, 438 P.2d 688, 690 (1968) (precluding plaintiff who fails to seek timely amendment of complaint in trial court from asserting right to amend on appeal); *Levine v. Empire Sav. & Loan Ass'n*, 579 P.2d 642, 646 (Colo. App. 1977), *aff'd*, 197 Colo. 293, 592 P.2d 410 (1979) (citing *Fladung* to reject claim that complaint was dismissed prematurely).

instead to stand on these clearly pre-empted allegations and take an appeal. Colorado law limits them to the case made by their complaint, not the imaginary case conjured by their presentation of alleged issues in this Court.[14]

b. The Colorado Court of Appeals correctly applied ERISA pre-emption law to these allegations, in a manner consistent with the law of every federal circuit.

The Colorado Court of Appeals' opinion is well-reasoned, pays careful attention to the prolix and detailed allegations of the complaint,[15] and thoroughly canvasses the relevant law.

ERISA § 514(a), 29 U.S.C. § 1144(a), provides that the statute "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." This Court has held that this "virtually unique

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[14] Petitioners' failure to make the Plan a party in this Court is curious and probably fatal to their claims. Their complaint seeks relief against the Plan, and the Plan's conduct is at the heart of their case. Under C.R.C.P. 19, the Colorado equivalent of Fed. R. Civ. P. 19, the Plan would be an indispensable party. *See Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670 (Colo. 1982). Because they do not challenge the portion of the judgment below dismissing the Plan, the relief they seek against Mobil is purely advisory. That is, if their claims against the Plan in the portions of the complaint that they do not challenge are pre-empted, all of their claims are pre-empted.

[15] "[T]he complaint . . . is comprised of twenty-two pages replete with references to ERISA regulations and allegations regarding the administration of the retirement plan . . . ." *Houdek*, 879 P.2d at 419 (Pet. App. at 2a).

pre-emption provision,"[16] is "'conspicuous for its breadth'" and was "designed to 'establish pension plan regulation as exclusively a federal concern.'"[17] "The key to § 514(a) is found in the words 'relate to'" and those words must be given their "'broad common-sense meaning.'"[18] Under the "relate to" test, "[p]re-emption applies to common law contract and tort claims if the factual basis of the cause of action involves an employee benefit plan."[19]

The Colorado Court of Appeals, applying this test, carefully reviewed the factual allegations of Petitioners' complaint and agreed with the Fifth Circuit in *Christopher* that Petitioners claims are pre-empted because "the existence and administration of the retirement plan . . . form[] the core of [Petitioners'] claims for relief."[20] Moreover, "adjudication of [Petitioners'] claims . . . would involve examining, at a minimum, the operation and funding of the retirement plan

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[16] *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 24 n.26 (1983).

[17] *Ingersoll-Rand*, 498 U.S. at 138 (citations omitted); *see also Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) (quoting many pronouncements concerning breadth of ERISA pre-emption).

[18] *Ingersoll-Rand*, 498 U.S. at 138-39 (citation omitted); *accord Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983).

[19] *Kelso v. Gen. Am. Life Ins. Co.*, 967 F.2d 388, 390 (10th Cir. 1992) (emphasis added); *accord Monarch Cement Co. v. Lone Star Indus.*, 982 F.2d 1448, 1452 (10th Cir. 1992); *Settles v. Golden Rule Insurance Co.*, 927 F.2d 505, 509 (10th Cir. 1991).

[20] *Houdek*, 879 P.2d at 422 (Pet. App. at 8-9a).

prior to the eligibility changes, the language of the amendments to the retirement plan, and Mobil's communications to [Petitioners] concerning the terms of the retirement plan amendments."[21] No case cited by Petitioners in support of any of their arguments authorizes, much less requires, a state court to conduct such a detailed analysis of ERISA and an ERISA-governed pension plan.

The Court of Appeals also correctly found that pre-emption was necessary to satisfy ERISA's purpose of ensuring that plans and plan sponsors would be subject to a "uniform body of federal regulation" and to minimize the administrative and financial burden of complying with conflicting directives among states or between states and the federal government.[22] ERISA "sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility," and it contains express provisions governing the content and timing of the disclosure of plan amendments by employers and plan administrators.[23]

Petitioners concede that Mobil complied with its disclosure obligations under ERISA, yet they nevertheless contend that the many states in which Petitioners and putative

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[21] *Houdek*, 879 P.2d at 423 (Pet. App. at 9a); *see Christopher*, 950 F.2d at 1218 (Pet. App. at 53a); *see also Ingersoll-Rand*, 498 U.S. at 140 (claims pre-empted as relating to a plan where "the court's inquiry must be directed to the plan").

[22] *Houdek*, 879 P.2d at 423 (Pet. App. at 10a); *see Ingersoll-Rand*, 498 U.S. at 142.

[23] *Ingersoll-Rand*, 498 U.S. at 137 (quoting *Shaw*, 463 U.S. at 91) (emphasis added); *see* ERISA §§ 102 and 104, 29 U.S.C. §§ 1022 and 1024; 29 C.F.R. § 2520.104b-1, § 2520.104b-3, § 2520.104b-4.

class members were employed by Mobil should be free to impose additional duties to disclose information about Plan amendments. *See Houdek*, 879 P.2d at 424 (Pet. App. at 12a). But as the *Christopher* court explained:

> Superimposing state law fraud standards on the elaborate ERISA provisions governing the content and timing of notice of plan provision and amendments . . . would undercut the goal of uniform national regulation in the manner that section 514(a) seeks to prevent.[24]

The Court of Appeals' decision was consistent with *Christopher* and many other federal decisions applying *Ingersoll-Rand*'s "relate to" test and holding that ERISA pre-empts state law claims alleging that an employee retired in reliance on an employer's purported misrepresentation of pension rights or benefits.

Indeed, every federal circuit that has considered the issues presented in this case has reached a result consistent with *Christopher* and the Colorado Court of Appeals. *See Sanson v. General Motors Corp.*, 966 F.2d 618, 621 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993) (applying *Ingersoll-Rand* to pre-empt state law claim for fraudulent misrepresentation purportedly causing plaintiffs' early retirement); *Berger v. Edgewater Steel Co.*, 911 F.2d 911,

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[24] 950 F.2d at 1219 (Pet. App. at 55a); *see also Howard v. Gleason Corp.*, 901 F.2d 1154 (2d Cir. 1990); *Lee v. E.I. DuPont*, 894 F.2d 755, 758 (5th Cir. 1990); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1469-70 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *accord National Elevator Industry, Inc. v. Calhoon*, 957 F.2d at 1558 ("'laws that create reporting [or] disclosure . . . requirements for ERISA plans,'" are pre-empted because they "relate to" plans).

921-923 (3d Cir. 1990), *cert. denied*, 499 U.S. 920 (1991) (ERISA pre-empts state law claims of retirees who allege that former employer misrepresented eligibility for lump-sum retirement benefit, even though plaintiffs lack ERISA standing); *Lee*, 894 F.2d at 758 (state law fraud and negligent misrepresentation claims "relate to" employee benefit plan and are pre-empted without regard to whether ERISA provides any remedy for wrongs alleged).

Petitioners overstate the significance of the Tenth Circuit's single footnote of dicta in the *Raymond* case. There were no state law claims in *Raymond,* and as the Tenth Circuit said, "[p]re-emption is not at issue in this case, and we do not address it."[25] Furthermore, that court did not have before it the present complaint, which -- as the Colorado Court of Appeals recognized -- requires a state court to parse Plan terms, Plan administration and ERISA itself. *See Houdek*, 879 P.2d at 422-424 (Pet. App. at 9-11a).[26]

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[25] 983 F.2d at 1538 (Pet. App. at 35a).

[26] In the Colorado Court of Appeals, Petitioners also relied heavily on *Cutler v. Phillips Petroleum Co.*, 859 P.2d 1251 (Wash. App. 1993), *rev'd*, 881 P.2d 216 (Wash. 1994). The Court of Appeals declined to follow *Cutler*, saying "we do not find that reasoning persuasive." The Washington Supreme Court has reversed the intermediate appellate court, finding that plaintiff's express references to the ERISA plan required holding the claims pre-empted. 881 P.2d 216.

c. Plaintiffs have not identified any significant issue warranting certiorari.

Petitioners cite several state[27] and federal[28] cases that they say conflict with the Court of Appeals' analysis. These cases are inapposite, for they all involve claims that could be resolved without reference to the terms, conditions or administration of an ERISA pension plan, or that were cognizable under ERISA because the plaintiff was a "participant."

Petitioners claim that the Colorado Court of Appeals applied a test "less stringent" than the statutory standard

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[27] The plaintiff in *Pace v. Signal Technology Corp.*, 628 N.E.2d 20 (Mass. 1994) conceded he was not covered by an ERISA health plan, but sought a remedy for his employer's alleged misrepresentation concerning coverage; he made no claim as to improper plan administration. The Massachusetts court recognized that there is no bright-line test for ERISA pre-emption and that each case must be decided on its particular facts. 628 N.E.2d at 160 n.5. In *HealthAmerica v. Menton*, 551 So.2d 235 (Ala. 1989), *cert. denied*, 493 U.S. 1093 (1990), the insurance company and the employer had misrepresented the terms of a health plan that the plaintiff was invited to join; the claims had nothing to do with plan administration. Moreover, it is doubtful that *Menton* is the law even in Alabama. *See Robinson v. Fikes of Alabama, Inc.*, 804 F. Supp. 277, 283 n.4 (M.D. Ala. 1992) (noting *Menton* is contrary to *Ingersoll-Rand* and to a later Alabama supreme court case).

[28] *Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1401 (1994) held that a sole shareholder of a corporation was a plan "participant" whose relation to the plan, and whose beneficiaries' relation, was governed by ERISA and not state law; similarly, petitioners here were plan "participants" at the time of the misconduct alleged in their complaint and their relation to Mobil and the Plan is governed exclusively by ERISA. *Harris v. Provident Life & Acc. Ins. Co.*, 26 F.3d 930 (9th Cir. 1994) simply holds that a federal court does not have jurisdiction to rule on ERISA pre-emption if there is no ERISA cause of action.

"relate to." Pet., at 4. This claim misstates the Court of Appeals' holding and the applicable law. In fact, the Court of Appeals' test, which Petitioners attack as "diffuse," is taken directly from this Court's opinion in *Ingersoll-Rand*.[29] The Court of Appeals correctly pointed out, 879 P.2d at 422 (Pet. App. at 7-8a), that ERISA pre-empts not only state laws that facially affect plan terms and administration, but also state law claims under facially neutral provisions, provided the claim in question affects the terms, conditions, or administration of an ERISA plan.

Petitioners' implicit reliance on the certiorari grant in *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708 (2d Cir. 1993), *cert. granted sub nom. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 305 (1994), is entirely misplaced. *Travelers* presents a circuit conflict as to the validity and application of state statutes and regulations imposing surcharges or taxes on some ERISA-based health plans and not on others. The alleged ERISA connection is the indirect economic impact of such charges on levels of premiums and benefits.

In this case, by contrast, Petitioners are seeking a rule that states may directly regulate Plan administration inconsistently with ERISA. This subject was conclusively and recently canvassed in *Ingersoll-Rand*, whose teaching -- as we show above -- has been consistently applied by the federal appellate courts.

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[29] "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." 498 U.S. at 139 (citation omitted).

3. The Colorado Court of Appeals neither created a "safe harbor" for employer fraud nor federalized employment law; to the contrary, its decision respects and is independently justified by Colorado's employment-at-will doctrine.

Petitioners cannot make a principled claim that they are hamstrung by a gap in remedies, nor that employer fraud finds a safe harbor in ERISA. For ERISA-based claims, Congress has provided several remedies. For example, the Secretary of Labor possesses enforcement powers to remedy ERISA violations even where individuals have no standing to sue.[30] ADEA provides a remedy for pension plan changes that result in age discrimination if an action is timely filed and supported by evidence. ADEA claims are exempted from ERISA pre-emption. *See* ERISA § 514(d), 29 U.S.C. § 1144(d).

Petitioners aggressively, although unsuccessfully, pursued all available remedies. They wrote and asked the Secretary of Labor to act. ADEA claims based on the facts in issue here were timely litigated by one retiree and the Tenth Circuit held that "Mobil did not violate the ADEA." *Mitchell*, 896 F.2d at 473. Represented by the same lawyers, retirees pressed their ADEA claims in two federal circuits, both of which found them time-barred. *Christopher*, 950 F.2d at 1217 (Pet. App. at 51a); *Raymond*, 7 F.3d at 186. The "gap" has been one not of remedies, but of proof and diligence.

Petitioners are mistaken in contending that there can

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[30] *See* ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5).

be no ERISA pre-emption if a plaintiff lacks standing to bring an ERISA cause of action. This Court has repeatedly stressed that Congress intended to pre-empt state law even where a plaintiff has no ERISA cause of action.[31] Thus, it is well-established that ERISA standing is not a prerequisite to ERISA pre-emption.[32] And, as *Raymond* held, these Petitioners had ERISA standing to challenge the lump sum changes that Mobil announced on July 2, 1984,[33] but in effect elected their remedy by retiring and taking a sizable lump sum.

Petitioners' dire warning, Pet., at 10-11, that ERISA pre-emption "is inexorably federalizing" state employment law is unfounded. Colorado employment law is alive, well, and independent. Indeed, Petitioners have conceded in the courts below that they were employees-at-will under Colorado law, without any right to their jobs. That is, even if these claims were not pre-empted by ERISA, they would not survive under state law.[34] Once again, "there simply is no

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[31] *See Ingersoll-Rand*, 498 U.S. at 144; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-65 (1987); *Pilot Life*, 481 U.S. at 54; *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

[32] *See, e.g., Sanson*, 966 F.2d at 921-23; *Berger*, 911 F.2d at 619-22; *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272 (6th Cir. 1991), *cert. dismissed*, 113 S. Ct. 2 (1992); *Hermann Hospital v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1290-91 (5th Cir. 1988).

[33] *Raymond*, 983 F.2d at 1533 n.9 (Pet. App. at 27a).

[34] Regardless of ERISA pre-emption, the pleaded tort claims are barred by the employment-at-will doctrine. *See Continental Airlines v. Keenan*, 731 P.2d 708 (Colo. 1987). Petitioners' citation, Pet., at 9, of *Berger v. Security Pacific Information Systems, Inc.*, 795 P.2d 1380 (Colo.

cause of action if there is no plan." *Ingersoll-Rand*, 498 U.S. at 140.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that the Court dismiss the petition as untimely, or in the alternative that the petition be denied.

App. 1990), to suggest otherwise is misplaced, since *Berger* states that an "employer's right to terminate an at-will employee without cause does not protect the employer from liability for fraud *in inducing the employee to accept employment*." 795 P.2d at 1384 (emphasis added); *see also Hunter v. Up-Right, Inc.*, 864 P.2d 88, 89 (Cal. 1993) ("wrongful termination of employment ordinarily does not give rise to a cause of action for fraud or deceit, even if some misrepresentation is made in the course of the employee's dismissal").

Respectfully submitted,

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January 13, 1995

APPENDIX

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 89 CV 14357, Courtroom 8

CLASS ACTION COMPLAINT AND JURY DEMAND

HAROLD A. HOUDEK, FREDERIC J. RAYMOND, J. A. MORRISON, GEORGE H. LIVERIS, ROBERT A. IRWIN, CECIL J. ALLMON, JOSE AUGUSTO, JR., R.S. BANNER, JR., A.D. BOND, CLEMONT H. BRUCE, HARVEY A. CARSON, JR., BILLY JACK DUNN, VIRGINIA HOWARD, SYLVESTER J. JAYE, T.L. MARTIN, IRA S. REAVIS, E. SHEPARD, HERMAN B. THOMASON, MARION LEON THOMPSON, BILLY RHEA SARGENT, AND CLARENCE E. WHITE, for themselves and on behalf of others similarly situated,

Plaintiffs,

vs.

MOBIL OIL CORPORATION, a New York Corporation, the RETIREMENT PLAN OF MOBIL OIL CORPORATION, itself and by the Trustees thereof, and one or more JOHN and/or JANE DOES and/or DOE ENTITIES,

Defendants.

COME NOW the plaintiffs above-named, individually and on behalf of others similarly situated, by and through their attorneys, Pryor, Carney and Johnson, A Professional Corporation, and for their claims against defendants, allege, aver, and state as follows:

GENERAL ALLEGATIONS

1. This Complaint asserts claims for civil frauds, negligent misrepresentation, civil conspiracy, and interference with contractual rights and business relationships. Compensatory and punitive damages as well as other relief are sought.

2. Plaintiffs are all citizens of the United States and are citizens of the states of their respective domiciles, specifically as follows: (a) New York -- Harold A. Houdek; (b) Colorado -- J.A. Morrison, George H. Liveris, and Robert A. Irwin; (c) Texas -- Cecil J. Allmon, R.S. Banner, Jr., A.D. Bond, Clemont H. Bruce, Harvey A. Carson, Jr., Billy Jack Dunn, Virginia B. Howard, T. L. Martin, Ira S. Reavis, E. Shepard, Herman B. Thomason, Marion Leon Thompson, Billy Rhea Sargent and Clarence E. White; (d) New Jersey -- Jose Augusto, Jr; (e) Michigan -- Sylvester J. Jaye; and (f) Ohio -- Frederic J. Raymond. The term "plaintiffs" hereinafter refers to the named plaintiff and all those similarly situated.

3. Defendant Mobil Oil Corporation ("Mobil") is a New York corporation licensed to do business in Colorado. Mobil is engaged in the business of oil and gas exploration, production and sales with offices located in Denver, Colorado, and throughout the United States.

4. Defendant Retirement Plan of Mobil Oil Corporation ("Plan") is a defined benefit plan sponsored by Mobil with a number of Plan participants residing in and working for Mobil in Colorado. Per Article 16, Section 1 of the Plan, the Vice-President of Employee Relations and the Treasurer of Mobil are named fiduciaries charged with the operation and administration of the Plan. As such, Mobil, individually and through its Board of Directors, Executive Committee and designated fiduciaries, was at times itself a fiduciary and owed fiduciary duties to plaintiffs. The Trustees of the Plan are named herein as nominal defendants solely in respect to the claims for relief asserted against the Plan.

5. There are other persons and/or entities who and/or which, upon information and belief, are liable upon one or more of the claims asserted herein. The identity of those persons and/or entities are unknown to plaintiffs at this time, and they are identified herein as John and/or Jane Does and/or Doe Entities. If and as the identity of such additional defendants becomes known to plaintiffs they may seek to amend their pleadings accordingly.

6. Both defendants are found in the state of Colorado, and this Court has jurisdiction over all defendants as well as jurisdiction over the subject matter of all claims asserted herein. Further, venue is properly laid in this judicial district, since Mobil has an office and place of business within this county, and the torts alleged herein were committed, **inter alia**, in this county.

7. Plaintiffs, at all times material hereto, were employees of Mobil.

8. Plaintiffs, at all times material hereto, were and/or are participants in the Plan who have earned and previously did earn accrued and vested benefits pursuant to the provisions of the Plan.

9. All claims for relief asserted in this Complaint are brought by the named plaintiffs as representative parties pursuant to Colo. R. Civ. P. 23. Such claims are brought by each of the named plaintiffs on behalf of himself or herself as well as on behalf of the class of all others similarly situated. Said class is defined as follows, subject to modifications by subsequent motions and orders under Rule 23:

> All persons who, as of January 1, 1985: (i) were participants in the Retirement Plan of Mobil Oil Corporation; (ii) were eligible to retire under the policies of Mobil Oil Corporation, and to receive retirement benefits in the form of a lump sum settlement from and under the terms of the Retirement Plan of Mobil Oil Corporation; (iii) were informed of proposed changes to the Plan's lump sum option, as described hereinbelow, and who believed, as of January 1, 1985, that the changes in the Plan would become effective on February 1, 1985; (iv) retired on or before January 1, 1985, in order to preserve their then-existing entitlement to the lump sum option from loss due to the proposed changes or who retired out of fear of additional such changes in the future that might vitiate their entitlement to the lump sum option; and (v) retired without knowledge of certain facts

alleged hereinbelow which Mobil concealed from them and which were material to their decision to retire from Mobil.

10. The class of such similarly situated persons referred to hereinabove is so numerous that joinder of all members of the class is impracticable. Additionally, there are questions of law or fact common to members of the class, and the claims of the representative plaintiffs are typical of the claims of all members of the class.

11. The named plaintiffs, as representative parties, will fairly and adequately protect the interests of the class and all members thereof.

12. The questions of law and/or of fact common to members of the class predominate over any questions affecting only individual members of the class, and litigation of the claims herein as a class action is a method of adjudication superior to any other method available for the fair and efficient adjudication of the controversies at issue here.

13. Named plaintiffs will move as soon as practicable for an order certifying this as a class action with respect to all claims requiring such certification.

14. Beginning in 1984 and continuing through the present, Mobil consciously and in reckless and wanton disregard of the rights and feelings of plaintiffs, willfully and deceitfully devised a means to rid itself of 1,000 or more highly compensated senior employees, ages 55 and over,

including the plaintiffs, knowing that their departure would save Mobil as much as $75,000,000 per year.

15. Mobil chose the fraudulent and otherwise unlawful manipulation of its retirement plan as the vehicle for ridding itself of such employees.

16. Beginning in 1977, Mobil made available to eligible employees a Plan benefit, known as the "lump sum option," allowing an eligible employee to elect to receive the funds in his retirement account in a single lump sum payment rather than in the form of periodic annuity payments. Only retirement eligible employees with a pension account of $250,000 or more or with personal net worth, exclusive of pension plan entitlements, of $250,000 or more, were entitled to avail themselves of the lump sum option.

17. The acts, omissions and conduct of Mobil employees, agents, officers, attorneys, directors, and of the Executive Committee complained of herein were within the scope and course of their employment by Mobil, were approved and/or ratified by Mobil and are thus imputed to Mobil as its acts and for which it is liable.

18. During the period 1977 to 1984, as a result of the required contributions to the Plan by Mobil and the fact that a 5% discount rate was used in determining the present value of each eligible employee's lump sum benefit, the lump sum option became substantially more valuable than the annuity option, and an increasing percentage of Mobil retirees entitled to the lump sum elected the lump sum over the annuity.

19. From 1977 until July 1, 1984, all retirement-eligible employees of Mobil meeting the $250,000 threshold at the time of retirement were entitled, subject to certain conditions which are not material here, to elect the lump sum, and during this period, nearly 1,700 Mobil employees retired and elected the lump sum option. As to each of those individuals, forced retirement before his or her desired date of retirement was not a condition of the right to elect the lump sum option.

20. Beginning in or about June 1982, Mobil's Executive Committee, purportedly out of concern for the increasing election of the lump sum option, began consideration of Plan changes to decrease utilization of the option by retiring employees.

21. From a time no later than early 1983, Mobil was aware: (a) of an Advisory Opinion of the National Office of the Internal Revenue Service ("IRS") interpreting the federal Employee Retirement Income Security Act of 1979, as amended (29 U.S.C. §§ 1101 et. seq..) (hereinafter "ERISA") to prohibit an employer from amending a qualified benefit plan to reduce a participant's "accrued benefit" (the "anti-cutback" rule); and (b) that the IRS interpreted the anti-cutback rule to prohibit reductions in any form of any benefit available under a plan, including a lump sum payment option.

22. In October 1983, an attorney from Mobil's Office of General Counsel wrote a memo advising caution concerning attempts to further restrict eligibility for the lump sum because such action might be viewed as an "impermissible preference" under Title I of ERISA.

23. Also in October 1983, an attorney in Mobil's Office of Tax Counsel expressed pessimism as to the likelihood of IRS approval of an increase in the eligibility threshold for the lump sum option of the Plan.

24. Notwithstanding the foregoing, Mobil's Executive Committee, by no later than December 1983, was giving serious consideration to changing the eligibility requirements for the lump sum option.

25. Following receipt of the attorney opinions from both its Tax and General Counsel offices expressing concern about any attempt to raise the threshold eligibility requirement for the lump sum option, Mobil retained the services of a former Commissioner of the Internal Revenue Service as a consultant to assist the company in its plan to raise the threshold requirement.

26. In late 1983, at Mobil's request, that consultant spoke with high ranking officials in the National Office of the IRS on a "no names" basis (Mobil's name not being identified) concerning the likely reaction of the IRS to a request to raise the threshold for the lump sum option.

27. As a result of this contact, Mobil learned that under IRS policy then in effect: (a) lump sums options were viewed as a valuable right which should be available to all plan participants; (b) restriction of lump sum eligibility in order to protect rank-and-file employees from their own improvidence was not favored; (c) the IRS perceived restrictive lump sum provisions as "sown with the seeds of discrimination"; (d) any attempt to amend Mobil's Plan to increase the lump sum eligibility requirement would not only

likely result in disapproval, but might well result in IRS insistence that the existing $250,000 threshold be removed; and (e) prospectively raising the 5% interest assumption rate used to calculate the present value of lump sum option settlements would likely be acceptable to the IRS.

28. On information and belief, plaintiffs allege that, also in December 1983, Mobil's Office of General Counsel expressed a second legal opinion, this time to the manager of Corporate Benefits in response to a request for an analysis of the legal implications of lump sum eligibility changes, advising Mobil that the proposed changes were discriminatory and would likely be disapproved by the IRS. Upon information and belief, that opinion was reiterated in a meeting held later that month among Mobil's in-house counsel.

29. Well in advance of January 1, 1984, Mobil knew that an IRS ruling required any retirement plan text to state the basis for calculating an optional form of retirement benefit such as the lump sum and that effective January 1, 1984, the IRS would prohibit any retroactive reduction of any accrued optional benefit calculated on the basis described in the text.

30. By December 1983, Mobil was also aware that the competitive trend among the major oil companies was toward broader, and, in most cases, universal eligibility for a lump sum option. By that time six of the 11 major American oil companies with lump sum options in their pension plans had no restrictions whatever on eligibility.

31. By December 1983, Mobil knew that to reduce its annual contributions to the Plan, it was unnecessary to raise the threshold if Mobil increased the actuarial assumption (the 5% discount rate). The latter was a step Mobil had planned to take for quite some time consistent with industry practice to utilize a higher discount rate. Mobil also knew that raising the interest assumption would likely be favorably received by the IRS so long as the interest assumption was raised prospectively, did not deprive Plan participants of accrued benefits, and was in line with interest rate assumption figures being used by competitors.

32. In December 1983 the Vice President of Employee Relations, who was also a named fiduciary of the Plan and a member of Mobil's Executive Committee, wrote Mobil's Board of Directors a memorandum enclosing a discussion paper concerning an upcoming Executive Committee Meeting. The paper acknowledged Mobil's awareness that the IRS had changed its views on lump sums, now favored liberal eligibility and might not approve restrictive eligibility provisions.

33. Thus, by the time of the December 20, 1983 Executive Committee meeting, Mobil knew that any effort to further restrict eligibility for the lump sum option by raising the threshold: (a) would likely be met with IRS disapproval on the basis that further restricting eligibility would be discriminatory in favor of highly compensated employees; (b) would be contrary to the competitive trend within the oil industry toward broader eligibility; (c) would cause employee morale problems and would likely result in complaints and lawsuits; (d) would require notice to the employees and would necessitate a transition plan to minimize accelerated

retirements; and (e) would result in an unlawful decrease in accrued benefits unless the employees' pre-amendment entitlements to the option were preserved and protected from cutback. At this time, Mobil also knew that in terms of savings to Mobil with respect to its annual cash contributions to the Plan, essentially equivalent savings could be accomplished by changing only the 5% assumption rate prospectively, a Plan amendment Mobil already knew would likely receive IRS approval. With such knowledge, Mobil decided in December 1983 to defer further consideration of changing the lump sum option pending informal contacts with the IRS.

34. At a January 1984 meeting of the Mobil Executive Committee even though the Committee had just deferred acting on changing the threshold the month before, pending discussion with the IRS and even though no such discussions had yet taken place -- the Committee once again discussed changes in the threshold requirement and the discount factor used to calculate lump sum settlements. At that meeting, Mobil considered "grandfathering" (i.e. applying prospectively) the 5% discount factor in calculating the present value of any lump sum benefits earned prior to any change in the Plan and establishing a "transition" plan (i.e. a grace period or window) whereby employees who had not previously elected the lump sum option in a timely fashion could do so under the $250,000 eligibility requirement by announcing their retirement from the company.

35. By January 1984, the Executive Committee knew that it would ultimately approve an increase in the threshold requirement and undertook a detailed analysis of the precise number of senior, highly paid Mobil employees who

would be forced to retire as a result of the change in the threshold requirement. Mobil knew by early 1984 that the total of all lump sum payments that would be required by any additional forced retirements could easily be absorbed by the current assets of the Plan.

36. On information and belief, Mobil began also in early 1984 to consider a possible acquisition of Superior Oil Company ("Superior"), an investment opportunity initially described within the Mobil hierarchy as "Project Styx." Discussion with and ultimate acquisition of Superior raised issues of employee surplusage for Mobil, as well as potential dilution in Mobil's earnings projected for five years after the acquisition.

37. Rather than choosing a reasonable alternative -- such as applying the amended threshold eligibility requirement prospectively, as it did with respect to the increase in the interest assumption -- Mobil chose to propose a Plan amendment that would impose the higher eligibility requirements on all employees -- even those who had already qualified under the $250,000 threshold -- and to establish the grace period or "retirement window" described hereinabove. Mobil took this action with full knowledge and the intent that senior, highly paid employees of Mobil facing the choice of continuing their employment with an attendant loss of a valuable right in the lump sum option would, in substantial numbers, be forced to elect early retirement.

38. In February 1984, Mobil, through its Executive Committee, knowing full well of the anti-cutback and anti-discriminatory policies of the IRS relating to optional forms of benefits and that any attempt to increase the threshold

would certainly result in numerous accelerated retirements, elected to propose a Plan amendment raising the lump sum eligibility requirement to $450,000, effective February 1, 1985. In doing so, Mobil expressly rejected other alternatives brought to its attention which would accomplish substantial and similar plan economies and other objectives of the Executive Committee with respect to the Plan and be received favorably by the IRS and Mobil's employees. The only Executive Committee memorialized justification for this increase was that the lump sum option had increased from 5% of retiree liability ($3,500,000) paid in 1971 to 71% of retiree liability ($149,000,000) paid in 1983. At the same meeting, the 5% interest rate used to determine Mobil's annual financial obligation to the Plan and to calculate the present value of the lump sum option was raised to 9 1/2% prospectively for service after January 1, 1985.

39. In late March 1984 Mobil's Board of Directors approved the issuance of debt securities of up to $2,500,000,000 to finance the acquisition of Superior and was aware that the annual interest expense on those debt securities alone would be between $100,000,000 and $200,000,000.

40. On information and belief, before voting to propose an increase in the threshold, members of the Executive Committee reviewed the status of their personal entitlements under the Plan, and upon being assured that each of them could easily meet the $450,000 threshold, in turn entitling them to a lump sum worth considerably more than the annuity, voted unanimously in favor of proposing an increase in the threshold.

41. By late February 1984, Mobil was aware, through analyses performed by its own actuaries, that an increase in the threshold would likely result in as many as 1,300 additional early retirements at a projected expense to the Plan of as much as $350,000,000, while Mobil itself would realize a savings in payroll and cost of future benefits of not less than $75,000,000 per year.

42. In the spring of 1984, Mobil retained a second outside consulting firm to study the implications of an early retirement program and to offer potential "solutions" to certain perceived "problems". As a result of this study, Mobil was advised that it was exposed to certain "risks" if the threshold requirements were increased: (a) extremely high turnover (accelerated retirements in the age 55 plus category) in the last half of 1984; (b) excessive cash flow demands on the Plan by reason of an increased number of employees leaving Mobil and electing the lump sum option; and (c) employee intervention in the amendment approval process or litigation.

43. In April 1984, the Mobil Vice President for Employee Relations wrote the members of the Mobil Board of Directors predicting that the change in eligibility for the lump sum would cause an additional 1,330 employees (i.e., those who would not otherwise retire) to retire in the six months following announcement of the proposed amendment.

44. An outside consulting firm retained by Mobil predicted in April 1984, on a "most-likely-case" scenario basis, that as many as 2,405 additional retirement-eligible employees would retire in 1984, most as a result of the change in the lump sum option eligibility requirements. This

actuarial firm projected an expense to the Plan of as much as $622,000,000. Mobil was told that retirement-eligible employees who would no longer be eligible for lump sum retirement effective February 1, 1985, were "extremely vulnerable" to, in effect, involuntary retirement because of the uncertainties that would result from the proposed change in the threshold requirement.

45. Although Mobil originally expressed concern that increased utilization of the lump sum option might become a financial drain on the Plan as a factor in its decision to seek even more restricted eligibility requirements, Mobil knew, before raising the threshold, that even a 100 percent utilization of the lump sum option posed no financial threat whatsoever to the substantially over-funded Plan. As of December 1983, the market value of Plan assets was approaching $1.9 billion. The Plan was then 144 percent funded in terms of vested liabilities and 140 percent funded in terms of accumulated liabilities. By the spring of 1984, the sole purpose of the proposed amendment was to force the early retirement of more than 1,300 senior, highly-paid employees who could be replaced by younger, lower-paid employees already within Mobil or joining the company from Superior.

46. At all times material hereto, Mobil also knew that the lump sum option was worth approximately 40% more to its employees than the annuity, and that was solely a consequence of the 5% interest rate assumption.

47. By early 1984, Mobil was aware that passage of the Retirement Equity Act (informally known as the Women's Equity Act) would codify the existing IRS policy

which applied the IRS's anti-cutback rule to optional forms of benefits such as the lump sum option, causing Mobil to acknowledge in May and June 1984 that this would probably preclude raising the lump sum threshold as to all employees for whom the benefit had already accrued.

48. In June 1984 members of Mobil's Board of Directors were informed by memorandum that passage of the Retirement Equity Act was likely and would further diminish an already unlikely chance of IRS approval of the threshold increase and that announcement of a proposed increase in the threshold would trigger about 1,000 additional retirements and would result in additional 1984 Plan lump sum payments of as much as $350,000,000.

49. Plaintiffs further allege, on information and belief, that immediately prior to the Executive Committee Meeting when the increased threshold was formally though conditionally approved, in-house counsel again advised Mobil that the proposed threshold changes would likely be viewed as discriminatory and in violation of existing IRS policy regarding cutbacks in accrued rights to optional forms of benefits. In light of this fact, among others, Mobil's conduct in proceeding with the amendment was willful.

50. On June 13, 1984 Mobil's Executive Committee voted unanimously to seek approval of a Plan amendment increasing the lump sum threshold from $250,000 to $450,000, indexed to the Consumer Price Index, applicable to retirements on February 1, 1985 and thereafter. The Executive Committee further determined that the $250,000 threshold would remain available to any retirement-eligible employee who retired on or before January 1, 1985. The

Executive Committee increased the interest rate from 5% to 9 1/2% with a pro-rata grandfather clause, also effective February 1, 1985.

51. On July 2, 1984, Mobil employees were informed in writing of the proposed change in the eligibility for the lump sum option, disclosing as a basis for the proposed change only that eligibility standards were to be updated to reflect inflation and/or to make the Plan cost competitive. The employees were also informed at that time that they could preserve their rights to the lump sum option under the $250,000 requirement only by retiring before January 1, 1985.

52. In making this announcement, Mobil deliberately failed to disclose and affirmatively concealed, **inter alia**, the following from its employees: (a) the current position of the IRS relative to restrictive eligibility; (b) the likelihood of IRS disapproval of the proposed increase; (c) Mobil's knowledge and rejection of various feasible alternatives to the increase in the threshold which could have avoided a large number of accelerated retirements; (d) Mobil's knowledge, through analysis by its and the Plan's actuarial staff and at least two outside actuaries, that the number of forced retirements upon announcement of a threshold increase could be predicted within a small percentage of error and would be substantially greater than the normal level of retirements; and (e) Mobil's true purpose for proposing the Plan amendments.

53. From and after June 13, 1984, Mobil's course of conduct was directed toward an undisclosed scheme to encourage employees to leave the company through forced

early retirements by, **inter alia**, threatening the loss of a vested, accrued and valuable retirement benefit while seeking to make the change appear lawful and proper.

54. Literature disseminated to employees concerning the lump sum option after the announcement of the threshold increases was calculated to and did exert pressure upon eligible employees to take early retirement, but such literature contained the same misrepresentations and omissions alleged hereinabove.

55. In its submission to the IRS in connection with the proposed threshold increase, Mobil willfully withheld and concealed from the IRS Mobil's knowledge that IRS approval of the threshold would cause an additional 1000 to 1330 retirements in 1984.

56. In October 1984, the Chairman of the Board of Mobil was advised that the Texas IRS agent reviewing Mobil's proposed Retirement Plan amendments had agreed to the increase in the threshold, expressly subject however to the inclusion of the "waiver clause," allowing Mobil's employees to seek exemption from the new threshold requirement in individual cases for valid cause shown.

57. In October 1984, Mobil's Board of Directors was advised in writing, not only of verbal approval by the IRS Dallas office, but of the IRS insistence upon the waiver clause and Mobil's agreement to the clause. But on October 25, 1984 Mobil advised its divisional employee relations managers and numerous other individuals in writing that the IRS had approved the "lump sum option" amendments to the Plan, but concealed from them the highly material waiver

clause insisted upon by the IRS. This materially misleading information was, in turn, conveyed to plaintiffs.

58. On November 12, 1984 Mobil's manager of corporate benefits, by interoffice correspondence, enclosed the proposed policy for administration of the Plan amendment and the new lump sum amendment language, including the employees' right to seek exemption from the $450,000 threshold. Thus, even before Mobil's receipt of formal IRS approval of the Plan amendment, Mobil had implemented a policy for administration of the amendment which meant departing employees could have been immediately notified of formal IRS approval and the waiver clause.

59. On November 23, 1984, the IRS Dallas Regional Office issued Mobil a favorable determination letter concerning the Plan amendments related only to the status of the Plan under the Internal Revenue Code.

60. It was not until December 21, 1984, just days before the exodus of the forced retirees, that correspondence was sent to employees advising them that the IRS had approved the "package of changes" scheduled to take effect on February 1, 1985. This announcement not only failed to disclose, but willfully concealed the waiver clause insisted upon by the IRS. Thereafter, Mobil never informed and willfully and deliberately concealed the existence of the waiver clause from the 1,000 or more employees affected by the threshold increase which was to go into effect on February 1, 1985.

61. Between October 25, 1984 and October 29, 1985, Mobil sent numerous employee benefit newsletters to

participants in Mobil's benefits programs, but not one of those mentioned the waiver clause.

62. As early as July 1985, outside counsel for Mobil had written a memorandum concerning the Plan, Revenue Ruling 85-59 and the lump sum benefit, noting that there had been no general announcement to employees about the existence of the waiver from the new threshold under the claims and appeals procedures of the Plan for "valid cause shown," concluding that it would be "prudent" for Mobil to announce the existence of the appeal right and suggested that the company be liberal in determining appeals.

63. It was not until August 1985, based on discussions with in-house counsel, that Mobil decided that it would thereafter "disclose" the waiver clause by burying it in the text of the company's benefit payment claims and appeals procedure. This decision was made by Mobil with the avowed intent of minimizing appeals brought pursuant to the waiver clause.

64. On October 29, 1985, Mobil finally did disclose the waiver in a mailing to still-employed participants in the corporate benefits program but elected not to so inform the 1,000 or so retirees (i.e., plaintiffs herein) who had already retired because of the threshold increase. The waiver was announced in such a way to draw as little attention to its existence as possible.

65. Not only did Mobil knowingly elect a course of action with respect to increasing the threshold with the intended and predicted result of forcing the retirement of approximately 1,000 highly compensated, senior Mobil

employees, age 55 or older, Mobil thereafter deliberately, deceitfully and fraudulently concealed its misconduct from plaintiffs.

66. Mobil's conduct constituted fraudulent concealment.

67. Defendants also fraudulently concealed and continue to fraudulently conceal, **inter alia**, the material fact that the Plan amendment proposed in June 1984 was itself amended after July 31, 1984 and that the amendment, as actually approved by the IRS, was therefore made after the effective date of the Retirement Equity Act, under which the illegality of Mobil's "cutback" on the lump sum option was confirmed.

68. On information and belief, plaintiffs allege that Mobil also deliberately concealed from the IRS Mobil's intention not to use the exemption for the purpose intended by the IRS, Mobil's intention not to disclose the existence of the waiver clause to affected retirees, and its plan to allow 1,000 or more retirees to leave Mobil with no knowledge whatever of the existence of the waiver clause.

69. On information and belief, as a result of the changes to the Plan and the misrepresentations and concealment of Mobil concerning the changes, certain assets of the Plan were used for the benefit of Mobil.

70. Mobil's conduct in electing to raise the threshold, although incidentally involving the Plan to the extent that Mobil manipulated accrued benefits and rights under the Plan, was, in reality, a scheme and willful plan

designed to force plaintiffs into early retirement, and if litigation ensued, Mobil would be in a position to claim that plaintiffs' common law claims were preempted by ERISA. Plaintiffs' involuntary retirements proximately resulted from Mobil's deceit only indirectly related to the Plan, the manipulation of which was used as a means to ends unlawful under law independent of ERISA and causing injury independent of those remedied under ERISA.

71. Plaintiffs allege that their pursuit of any remedy under the Mobil Retirement Plan for the injuries alleged herein would be futile.

72. Plaintiffs have exhausted or will by operation of law have exhausted their administrative remedies.

73. The Plan, acting through its trustees, fiduciaries and agents, aided, abetted and ratified Mobil's misconduct as alleged herein and conspired with Mobil and others to violate plaintiff's rights, as alleged herein.

74. All defendants fraudulently concealed the existence of the factual basis for some or all of the claims asserted herein, such factual basis having been learned only through discovery in an action filed against defendants herein by one Porter Mitchell, a Mobil retiree adversely affected by the same misconduct alleged herein. That action was filed in federal district court in Colorado and was denominated **Mitchell v. Mobil Oil Corp.**, Civil Action No. 86-Z-585 (D. Colo.). The case ended in a Jury verdict and judgment in favor of Mitchell, and the case is now on appeal.

75. Defendants' efforts to conceal, **inter alia**, the "waiver clause" and other material facts alleged hereinabove from Mr. Mitchell continued until at least May 1988, and continued thereafter as to the plaintiffs in this action until at least November 1988.

76. The claims asserted herein were first asserted on December 30, 1988, as part of a class action -- also filed in federal district court in Colorado, which action was denominated **Raymond v. Mobil Oil Corp.**, Civil Action No. 88-Z-2112 (D. Colo.). The Complaint and Amended Complaint in that action asserted claims under the Age Discrimination in Employment Act ("ADEA"), under ERISA and under applicable state law. By order of the court presiding over that action, as amended on August 15, 1989, the state-law claims were dismissed without prejudice, because the federal district court chose not to exercise pendent jurisdiction over those claims. Those state-law claims are refiled in state court by way of this Complaint and in accordance with applicable statutory and common law.

FIRST CLAIM FOR RELIEF
(Common Law Fraud Against
Mobil Oil Corporation Only)

77. Paragraphs 1 through 54 and 65 through 76 of the General Allegations are incorporated herein by this reference and are made a part hereof as though fully set forth.

78. This Claim for Relief as well as the Second, Third, Fourth and Sixth Claims for Relief are directed only against Mobil and not against the Plan or Plan fiduciaries and seeks damages, both compensatory and exemplary, only from Mobil.

79. Mobil's conduct in July, 1984 and thereafter in affirmatively misrepresenting and concealing material facts concerning the specific purpose for raising the Plan threshold to $450,000, while knowing that the increase would, in fact, force the retirement of as many as 1,000 or more retirement-eligible Mobil employees, constitutes the tort of fraud and deceit.

80. Specifically, Mobil misrepresented that the change in eligibility standards for the lump sum option effective for retirements beginning February 1, 1985 was to make the Plan more "cost competitive" and that the increase in the threshold was to "update" the threshold to reflect inflation since the present eligibility standards were established. Mobil's real intent was to force the retirement of 1,000 or more highly paid employees.

81. Further, Mobil misrepresented and/or concealed, **inter alia**, the following material facts:

(a) That the change in the threshold, coupled with the increase in the discount rate to 9 1/2 percent discount rate, would not make the Plan more "cost competitive" as this would only result in an additional savings to Mobil in terms of cash contributions to the Plan of approximately $4,000,000 per year, when Mobil knew it would cost more than that to exit these additional retirees from Mobil.

(b) That the Plan was already over-funded and that Mobil's annual contribution to the Plan had decreased substantially from the preceding year, and that there was no need to "update" the threshold to reflect inflation since "updating" amounted to nothing more than an attempt to further limit the number of rank and file employees who could exercise the option.

(c) That any further attempt to restrict the right to a lump sum option and to cut back already accrued rights to the option by raising the threshold violated then-existing IRS policy, a fact that had been called to Mobil's attention by in-house and outside counsel for Mobil both before and after the proposed amendment had been conditionally approved by Mobil's Executive Committee.

(d) That Mobil knew the proposed threshold increase would effectively close an early retirement window for an additional 1,000 plus Mobil employees who were almost certain to retire with the announcement of the proposed threshold increase.

(e) That the real purpose for the "retirement window," the six month period between July 1984

and January 1, 1985, during which retirement-eligible employees who could meet the existing $250,000 threshold could retire with the lump sum, was to force the retirement of those employees.

(f) That on June 13, 1984, the Executive Committee voted to grandfather or exempt employees from the new threshold providing they met the old threshold, had elected prior to July 2, 1984 to retire and who would retire prior to July 2, 1985.

(g) That Mobil was selectively and secretly granting certain employees positive incentives to retire, while not offering such to the others, including the plaintiffs herein.

(h) That Mobil had no intention of informing the IRS in connection with its application for approval of the threshold increase of the fact that the threshold increase would accelerate the retirement of at least an additional 1,000 Mobil employees.

82. Mobil made such misrepresentations knowing them to be false and omitted to state material facts necessary to avoid deceiving and misleading plaintiffs in respect to their decision to retire from Mobil.

83. Mobil made such representations and committed such omissions intending that plaintiffs act and rely upon the representations and upon the impressions created by the omissions.

84. Plaintiffs justifiably relied on those representations and impressions.

85. Mobil was aided and abetted by one or more John and/or Jane Does and/or Doe entities in the fraud alleged herein, in that such persons and/or entities knew or were reckless in not knowing of the false representations of Mobil and that Mobil had concealed material facts from plaintiffs, and such persons and entities gave substantial assistance or encouragement to Mobil in connection with its fraud upon plaintiffs.

86. The fraud of Mobil proximately caused damage to each of the plaintiffs, in amounts to be proven at trial.

87. The conduct of Mobil described herein was attended by circumstances of fraud, malice and/or constituted misconduct purposely or heedlessly and recklessly committed without regard to its consequences or to the rights, interests, and feelings of plaintiffs.

WHEREFORE, each plaintiff on behalf of himself, herself, and all others whom he or she represents herein prays for judgment in favor of the named plaintiffs and the plaintiff class and against Mobil Oil Corporation upon this First Claim for Relief, awarding each plaintiff such damages as are shown hereafter to have been proximately and directly caused by the fraudulent conduct of Mobil Oil Corporation; awarding each plaintiff exemplary damages against Mobil Oil Corporation in an amount sufficient to punish Mobil Oil Corporation and deter it and others from similar wrongful conduct in the future; awarding each plaintiff such equitable and/or declaratory relief as may be necessary to restore each to his or her rightful employment status and all other attendant rights and interests or their equivalent; awarding plaintiffs their costs incurred in the course of this action, including

expert witness and attorney fees in accordance with applicable law, together with prejudgment, moratory, and postjudgment interest in accordance with applicable law; and awarding such other relief as is necessary and appropriate to remedy the harms inflicted by defendant Mobil Oil Corporation upon plaintiffs.

SECOND CLAIM FOR RELIEF
(Common Law Fraud Against
Mobil Oil Corporation Only)

88. Paragraphs 1 through 76 of the General Allegations and paragraphs 78 through 84 of the First Claim for Relief are incorporated herein by this reference and are made a part hereof as though fully set forth.

89. Mobil's conduct alleged herein, in willfully concealing from November, 1984 to the present, from affected Mobil retirees including plaintiffs, the existence of the "waiver clause" required by the Internal Revenue Service as a condition of IRS approval of the threshold increase, constituted the tort of fraud of deceit.

90. Specifically, Mobil misrepresented that the IRS had approved the threshold without changes. In announcing the IRS approval of the threshold increase to Mobil employees in December 1984, Mobil announced approval of the "package of changes" scheduled to take effect on February 1, 1985. Mobil's intent by this announcement was to cozen, trick and deceive retirement-eligible employees into leaving without knowledge of their rights under the waiver clause and into believing that they had no right or way to challenge the threshold increase in light of its approval by the IRS.

91. Specifically, Mobil concealed the following material facts:

(a) That as an express condition of IRS approval of the threshold increase, the IRS insisted and Mobil agreed to add to the threshold amendment the waiver clause;

(b) That after agreeing to include a waiver clause in the Plan amendment ultimately approved by the IRS in late November, 1984, it had no intention of granting any waivers from the $450,000 threshold requirement to any retirement-eligible employees who had or would have qualified under the existing $250,000 threshold; and

(c) That the Plan amendment as actually approved by the IRS was necessarily made after the federal Retirement Equity Act had become effective, which rendered the threshold charge itself unlawful under federal law.

92. Mobil made such misrepresentations knowing them to be false and omitted to state material facts necessary to avoid deceiving and misleading plaintiffs in respect to their decision to retire from Mobil.

93. Mobil made such misrepresentations and committed such omissions intending that plaintiffs act and rely upon the misrepresentations and upon the impressions created by the omissions.

94. Plaintiffs justifiably relied on those misrepresentations and impressions.

95. Mobil concealed the existence of the waiver clause not only from Mobil retirees who were forced to retire because of the threshold increase, but as well all active Mobil employees and did so in numerous communications concerning the Plan between late October 1984 and late October 1985.

96. Even when Mobil finally did partially disclose the waiver clause to existing employees in late October, 1985, it failed intentionally to inform the retirees directly affected by the threshold increase, i.e., those employees, including plaintiffs, who had already been forced to retire to protect their lump sum option rights.

97. Even upon disclosing the existence of a waiver avenue in late October, 1985, Mobil, knowing that the intended disclosure still did not meet ERISA disclosure requirements, announced the existence of Mobil's power to waive the new threshold requirement and described this in such a fashion as to conceal its meaning and true purpose. The ruse was committed by Mobil with the intent of minimizing claims and appeals concerning the threshold increase.

98. Mobil's pattern of concealment continued in the case of **Mitchell v.Mobil Oil Corp., et al.**, U.S. District Court, District of Colorado, 86-Z-5855, as Mobil deliberately concealed from Mr. Mitchell, **inter alia**, the existence of the waiver until May, 1988.

99. Mobil was aided and abetted by one or more John and/or Jane Does and/or Doe entities in the fraud alleged herein, in that such persons and/or entities knew or were

reckless in not knowing of the false representations of Mobil and that it had concealed material facts from plaintiffs, and such persons and entities gave substantial assistance and/or encouragement to Mobil in connection with its fraud upon plaintiffs.

100. The fraud of Mobil proximately caused damage to each of the plaintiffs, in amounts to be proven at trial.

101. The conduct of Mobil described herein was attended by circumstances of fraud, malice and/or constituted misconduct purposely or heedlessly and recklessly committed without regard to its consequences or to the rights, interests, and feelings of plaintiffs.

WHEREFORE, each plaintiff on behalf of himself, herself, and all others whom he or she represents herein prays for judgment in favor of the named plaintiffs and the plaintiff class and against Mobil Oil Corporation upon this Second Claim for Relief, awarding each plaintiff such damages as are shown hereafter to have been proximately and directly caused by the fraudulent conduct of Mobil Oil Corporation; awarding each plaintiff exemplary damages as against Mobil Oil Corporation in an amount sufficient to punish Mobil Oil Corporation and deter it and others from similar wrongful conduct in the future; awarding each plaintiff such equitable and/or declaratory relief as may be necessary to restore each to his or her rightful employment status and all other attendant rights and interests or their equivalent; awarding plaintiffs their costs incurred in the course of this action, including expert witness and attorney fees in accordance with applicable law together with prejudgment, moratory, and postjudgment interest in accordance with applicable law; and

awarding such other relief as is necessary and appropriate to remedy the harms inflicted by defendant Mobil Oil Corporation upon plaintiffs and all others similarly situated.

THIRD CLAIM FOR RELIEF
(Negligent Misrepresentation Against Mobil Oil Corporation Only)

102. Paragraphs 1 through 54 and 65 through 76 of the General Allegations and paragraphs 78, 80 and 81 of the First Claim for Relief are incorporated herein by this reference and are made a part hereof as though fully set forth.

103. In accordance with Colo. R. Civ. P. 8(e)(2), and in the alternative to the allegations contained in paragraphs 82 and 83 of the First Claim for Relief, plaintiffs allege as follows:

(a) Mobil gave false information and created in plaintiffs false impressions concerning plaintiffs' employment and retirement rights;

(b) Mobil gave such false information and created such false impressions in the course of Mobil's activities as an employer of plaintiffs;

(c) Mobil gave the information to plaintiffs and created the impressions in plaintiffs for the guidance and use of plaintiffs in making decisions regarding their employment and retirement;

(d) Mobil was negligent in the communications alleged herein;

(e) Mobil gave the information and created the impressions with the intent or knowing that plaintiffs would act or decide not to act in reliance on such information and impressions;

(f) Plaintiffs did rely on the information supplied and impression created by Mobil; and

(g) Such reliance caused damage to each of the plaintiffs, in amounts to be proven at trial.

104. The conduct of Mobil described herein was attended by circumstances of fraud, malice and/or constituted misconduct purposely or heedlessly and recklessly committed without regard to its consequences or to the rights, interests, and feelings of plaintiffs.

WHEREFORE, each plaintiff on behalf of himself, herself, and all others whom he or she represents herein prays for judgment in favor of the named plaintiffs and the plaintiff class and against Mobil Oil Corporation upon this Third Claim for Relief, awarding each plaintiff such damages as are shown hereafter to have been proximately and directly caused by the negligent misrepresentations of Mobil Oil Corporation; awarding each plaintiff exemplary damages as against Mobil Oil Corporation in an amount sufficient to punish Mobil Oil Corporation and deter it and others from similar wrongful

conduct in the future-awarding each plaintiff such equitable and/or declaratory relief as may be necessary to restore each to his or her rightful employment status and all other attendant rights and interests or their equivalent; awarding plaintiffs their costs incurred in the course of this action, including expert witness and attorneys' fees in accordance with applicable law together with prejudgment, moratory, and postjudgment interest in accordance with applicable law; and awarding such other relief as is necessary and appropriate to remedy the harms inflicted by defendant Mobil Oil Corporation upon plaintiffs.

FOURTH CLAIM FOR RELIEF
(Negligent Misrepresentation Against Mobil Oil Corporation Only)

105. Paragraphs 1 through 76 of the General Allegations and paragraphs 88, 90 and 91 of the Second Claim for Relief are incorporated herein by this reference and are made a part hereof as though fully set forth.

106. In accordance with Colo. R. Civ. P. 8(e)(2), and in the alternative to the allegations contained in paragraphs 92 and 93 of the Second Claim for Relief, plaintiffs allege as follows:

(a) Mobil gave false information and created in plaintiffs false impressions concerning plaintiffs' employment and retirement rights;

(b) Mobil gave such false information and created such false impressions in the

course of Mobil's activities as an employer of plaintiffs;

(c) Mobil gave the information to plaintiffs and created the impressions in plaintiffs for the guidance and use of plaintiffs in making decisions regarding their employment and retirement;

(d) Mobil was negligent in the communications alleged herein;

(e) Mobil gave the information and created the impressions with the intent or knowing that plaintiffs would act or decide not to act in reliance on such information and impressions;

(f) Plaintiffs did rely on the information supplied and impressions created by Mobil; and

(g) Such reliance caused damage to each of the plaintiffs, in amounts to be proven at trial.

107. The conduct of Mobil described herein was attended by circumstances of fraud, malice and/or constituted misconduct purposely or heedlessly and recklessly committed without regard to its consequences or to the rights, interests, and feelings of plaintiffs.

WHEREFORE, each plaintiff on behalf of himself, herself, and all others whom he or she represents herein prays for judgment in favor of the named plaintiffs and the plaintiff class and against Mobil Oil Corporation upon this Fourth Claim for Relief, awarding each plaintiff such damages as are shown hereafter to have been proximately and directly caused by the negligent misrepresentations of Mobil Oil Corporation; awarding each plaintiff exemplary damages as against Mobil Oil Corporation in an amount sufficient to punish Mobil Oil Corporation and deter it and others from similar wrongful conduct in the future; awarding each plaintiff such equitable and/or declaratory relief as may be necessary to restore each to his or her rightful employment status and all other attendant rights and interests or their equivalent; awarding plaintiffs their costs incurred in the course of this action, including expert witness and attorneys' fees in accordance with applicable law together with prejudgment, moratory, and postjudgment interest in accordance with applicable law; and awarding such other relief as is necessary and appropriate to remedy the harms inflicted by defendant Mobil Oil Corporation upon plaintiffs.

FIFTH CLAIM FOR RELIEF
(Civil Conspiracy Against Mobil and Plan)

108. Paragraphs 1 through 107 of the General Allegations are incorporated herein by this reference and are made a part hereof as though fully set forth.

109. With the intent of promoting or facilitating the commission of various unlawful and wrongful acts -- including those alleged hereinabove, specifically including but not limited to acts of fraud and deceit and violation of plaintiffs' federal statutory and state common law rights -- defendants agreed with each other and/or with other persons, including John and/or Jane Does and Doe Entities, that they, or one or more of them, would engage in such unlawful and wrongful acts.

110. In the pursuit of such agreement, defendants and others engaged in a civil conspiracy and, in pursuit of that conspiracy, Mobil or one or more other persons and/or entities with whom it conspired, performed overt acts, including but not limited to the acts of fraud and deceit alleged hereinabove.

111. This civil conspiracy has proximately caused damages to each of the plaintiffs, the amounts of which damages will be proven at trial.

112. The formation and execution of this civil conspiracy was attended by circumstances of fraud, malice and/or constituted misconduct purposely or heedlessly and recklessly committed without regard to its consequences or to the rights and interests of plaintiffs, thereby entitling plaintiffs

and each of them to an award of punitive damages against each of the defendants.

WHEREFORE, each plaintiff on behalf of himself, herself, and all others whom he or she represents herein prays for judgment in favor of the named plaintiff and the plaintiff class and against Mobil Oil Corporation and the Retirement Plan of Mobil Oil Corporation upon this Fifth Claim for Relief, awarding each plaintiff such damages as are shown hereafter to have been proximately and directly caused by the tortious conduct of defendants; awarding each plaintiff exemplary damages against defendants in amounts sufficient to punish defendants and deter them and others from similar wrongful conduct in the future; awarding each plaintiff such equitable and/or declaratory relief as may be necessary to restore each to his or her rightful employment status and all other attendant rights and interests or their equivalent; awarding plaintiffs their costs incurred in the course of this action, including expert witness and attorney fees in accordance with applicable law, together with prejudgment, moratory, and postjudgment interest in accordance with applicable law; and awarding such other relief as is necessary and appropriate to remedy the harms inflicted by defendants upon plaintiffs.

SIXTH CLAIM FOR RELIEF
(Interference with Contractual Rights Against Mobil)

113. Paragraphs 1 through 76 of the General Allegations are incorporated herein by this reference and are made a part hereof as though fully set forth.

114. Mobil had actual knowledge of plaintiffs' contractual rights and rights in the nature of contractual rights in respect to the Plan. Mobil had such knowledge during all times material to this Claim for Relief.

115. By its conduct, as alleged hereinabove, Mobil intentionally and willfully interfered with plaintiffs' contractual rights, their rights in the nature of contractual rights, and their relationship with the Plan, and Mobil intentionally and willfully defeated and diminished plaintiffs' rights in the Plan and benefits attendant thereto. Mobil's conduct constitutes the tort of intentional interference with contractual rights and business relationships in that, **inter alia**, Mobil induced and/or manipulated the Plan to defeat or diminish the rights of the plaintiffs in the Plan.

116. As a direct and proximate result of Mobil's intentional interference with plaintiffs' contractual and business rights and relationships, plaintiffs have suffered damages each in an amount to be determined at trial.

117. The conduct of Mobil described herein was attended by circumstances of fraud and/or malice, and/or constituted misconduct purposely or heedlessly and recklessly committed without regard to its consequences or to the rights and interests of plaintiffs.

WHEREFORE, each plaintiff on behalf of himself, herself, and all others whom he or she represents herein prays for judgment in favor of the named plaintiffs and the plaintiff class and against Mobil Oil Corporation upon this Sixth Claim for Relief, awarding each plaintiff such damages as are shown hereafter to have been proximately and directly caused by the

tortious conduct of Mobil Oil Corporation; awarding each plaintiff exemplary damages against Mobil Oil Corporation in an amount sufficient to punish Mobil Oil Corporation and deter it and others from similar wrongful conduct in the future; awarding each plaintiff such equitable and/or declaratory relief as may be necessary to restore each to his or her rightful employment status and all other attendant rights and interests or their equivalent; awarding plaintiffs their costs incurred in the course of this action, including expert witness and attorney fees in accordance with applicable law, together with prejudgment, moratory, and postjudgment interest in accordance with applicable law; and awarding such other relief as is necessary and appropriate to remedy the harms inflicted by defendant upon plaintiffs.

PLAINTIFFS HEREBY DEMAND TRIAL TO A JURY OF SIX ON ALL CLAIMS SO TRIABLE.

DATED this 18th day of October, 1989.

Respectfully submitted,

PRYOR, CARNEY AND JOHNSON, A
Professional Corporation

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